

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

76-1071

To be argued by
DAVID J. GOTTLIEB

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

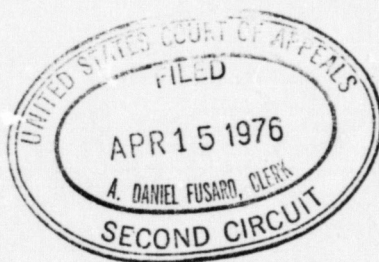
CALLIE V. BUSH,

Appellant.

BJS
Docket No. 76-1071

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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BRIEF FOR APPELLANT

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QUESTIONS PRESENTED

1. Whether appellant was entitled, as a matter of Federal statutory law, to a jury at her trial in the district court on charges of having committed a petty offense.

2. Whether, in the alternative, the District Court erred by failing to exercise its discretion to grant or deny appellant a jury trial.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Irving Ben Cooper) entered on January 15, 1976, after a non-jury trial, convicting appellant Callie V. Bush of one count of obstruction of the mails, in violation of 18 U.S.C. §1701. Appellant was sentenced to the custody of the Attorney General for six months. Execution of sentence was suspended and appellant was placed on probation for two years.

Timely notice of appeal was filed, and this Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

*Appellant Callie V. Bush was indicted on May 12, 1975, for embezzlement of mail by a Postal employee, in violation of 18 U.S.C. §1709. She pleaded not guilty, and the case was assigned to The Honorable Irving Ben Cooper. Appellant appeared on November 3, 1975, prepared to proceed to trial.

However, on that date, the Government filed an information which superseded the indictment, accusing appellant of the petty offense of obstruction of the mails, in violation of

18 U.S.C. §1701. The Assistant U.S. Attorney then argued that inasmuch as the charge against appellant had been reduced to a petty offense, appellant no longer had a right to a trial by jury (2*). Appellant requested a jury trial, arguing that since 18 U.S.C. §1701 provided for a fine in addition to a six-month jail term, a jury trial was mandated. Counsel also noted that he had prepared for a jury trial and that "[o]ur approach in the event a non-jury trial was anticipated would have been substantially different" (3). Finally, appellant claimed that the Government had filed the information to avoid a jury trial, and urged the court for an opportunity to engage in further research on the question (6-7).

In an off-the-record discussion, later summarized on the record by Judge Cooper, the Assistant U.S. Attorney stated that the charge against appellant had been reduced to a petty offense because of appellant's prior unblemished record, because of the heavy court calendar, and in the hope of inducing a plea of guilty (5). Although critical of the Government's "last-minute approach" (3), the court found that the defendant had no right to a jury trial and directed that she proceed to trial without a jury (8-9). Appellant was offered, and declined, the opportunity to move for a

*Numerals in parentheses refer to pages of the transcript of the trial dated November 3, 1975.

trial before a different judge, the jury panel was excused, and the trial commenced before Judge Cooper (10-13).

A. The Prosecution Case

On the evening of February 10, 1975, Postal Inspectors Richard P. Evans and Edward J. Lauth and Investigator Molina were on duty at the midtown post office, conducting "observation and t ;" of mail sorting in "Carrier Route 26" of the building (15-16, 43-44). Lauth prepared a pink test letter, placed eight dollar bills in the envelope, and recorded the serial numbers in an official form (44-45, 18, 84; Government Exhibit #4). He also brushed some fluoripone powder, a dusting material sensitive to ultraviolet light, on the bills (46-50). Lauth gave the test letter to one of the station supervisors, who placed it in a tray on Route 26 (47, 17).

Evans took his position with Molina on a lookout gallery about twenty-five feet from the distribution area, and observed appellant take her position and begin sorting the mail (16-18). After about ten minutes appellant came across what Evans recognized as the test letter. Instead of boxing it, appellant placed it beneath the other mail in her hand. When the letter appeared a second time, appellant ripped open the envelope, took out the money, and placed it inside her blouse (19, 35). Appellant continued sorting for a few more minutes

and then proceeded to the ladies' washroom (20, 48). As appellant returned to continue her work, Evans saw her remove, count, and return the dollar bills to her blouse (33). At about 2:45 a.m. the officers stopped appellant, took her to the supervisor's office, and advised her of her rights. Appellant was directed to remove the money on her person. She complied and handed over seven dollar bills (21-24). Lauth testified that the serial numbers on the dollar bills corresponded to the numbers listed on his description sheet (47). However, the examination of appellant's hands and clothing for the presence of fluoripone powder proved inconclusive (50). The test letter envelope, torn in pieces, was recovered from a wastebasket in the ladies' washroom by Mary Jenkins, a Postal Service security police officer (53, 55).

B. The Defense Case

Appellant Callie Bush, a forty-five year-old woman with no prior arrests or convictions, denied opening any envelope or taking any money (60, 77). On the morning of February 11, appellant, a six-year employee with the Postal Service, was assigned to the midnight to 8:00 a.m. shift, sorting mail along Route 26 (62, 65). At approximately 12:45 a.m., she went to the ladies' washroom for five or six minutes; she returned and continued sorting mail until her coffee break (69). At 2:40 a.m. she was stopped and ordered downstairs.

In response to an officer's question, appellant stated that she had seven dollars in her blouse, money she had put in her clothing as a reminder to pay a bill she owed to a co-worker (71; Defendant's Exhibit A).

Following brief summations, the court found appellant guilty as charged:

I have listened to the evidence. I see no motive for the testimony by the Government witness. I see absolutely no doubt in my mind as to the guilt of this defendant. I deny the motion. I find her guilty of the charge. I reject her testimony. I find credible and acceptable from every point of view the testimony adduced by the Government.

(95).

On January 15, 1976, appellant was sentenced on the District Court's verdict to six months' imprisonment, with execution of sentence suspended, and two years' probation. This appeal followed.

ARGUMENT

Point I

AS A MATTER OF STATUTORY LAW, APPELLANT WAS ENTITLED TO A JURY AT HER TRIAL IN THE DISTRICT COURT ON CHARGES OF HAVING COMMITTED A PETTY OFFENSE.

On the very date appellant appeared in court for her trial, prepared to submit her case to a jury, the Assistant U.S. Attorney filed a superseding information, reducing the charge against appellant to obstruction of mails. The prosecutor then moved to try the case before Judge Cooper without a jury, arguing that the Constitution does not require a jury trial for an offense with a maximum penalty of six months' imprisonment. The District Court agreed and denied appellant's application for a jury trial. However, the refusal by the court to grant the jury was error, since Congress has enacted no law denying appellant the right to a jury trial before the District Court. Thus, appellant had a statutory right to a jury trial quite apart from the minimum requirements of the Constitution. United States v. Bishop, 261 F. Supp. 969 (N.D.Cal. 1966); cf. Smith v. United States, 128 F.2d 990 (5th Cir. 1942); United States v. Marinelli, 240 F.Supp. 365 (N.D.Cal. 1965); United States v. Great Eastern Lines, Inc., 89 F.Supp. 839 (E.D.Va. 1950).

The Sixth Amendment to the Constitution gives defendants

the right to a jury trial in "all criminal prosecutions." However, a long line of cases have held that "petty offenses" involving a maximum sentence of less than six months' imprisonment are not "criminal prosecutions" for purposes of this Constitutional right to a jury trial. See Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974); Baldwin v. New York, 399 U.S. 66, 69 (1970); Frank v. United States, 395 U.S. 147, 149-150 (1969). While the normal mode of trials in the district courts and under common law is trial by jury (United States v. Bishop, *supra*), the legislature, if it wishes, may provide that such offenses be tried without a jury. District of Columbia v. Clawans, 300 U.S. 617 (1937). Here, the court correctly determined that the Constitution did not require that appellant, charged with an offense with a maximum of six months' imprisonment, be afforded a jury trial. However, the court never considered whether Congress had provided for or dispensed with a jury trial for such offenses. An analysis of recent statutes demonstrates Congressional intent to afford appellant a jury trial.

This issue was considered in United States v. Bishop, *supra*, 261 F.Supp. 969.* There, the defendant Bishop was charged with a petty offense triable before a United States Commissioner under former 18 U.S.C. §3401. That statute

*Appellant has not found adjudications on this issue from this Circuit.

provided, without any reference to a trial by jury, that a defendant could elect to be tried by the district court in lieu of trial before the magistrate.* The defendant elected trial in the district court and demanded a trial by jury.

The court noted that, as now, there is no provision in the Federal Rules of Criminal Procedure respecting whether a trial of a petty offense in the district court will be jury or non-jury. United States v. Bishop *supra*, 261 F.Supp. at 973.** The court also noted that 18 U.S.C. §§3401-3402, providing for summary trial of certain petty offenses before a commissioner, "cannot be stretched by interpretation to indicate an intent on the part of Congress or on the part of the Supreme Court as expressed in its rules, that there be no trial by jury when a defendant elects to proceed in the district court. In fact, the main benefit to be had by electing

*Former 18 U.S.C. §3401(b) provided:

Any person charged with a petty offense may elect, however, to be tried in the district court of the United States. The commissioner shall apprise the defendant of his right to make such election and shall not proceed to try the case unless the defendant after being so apprised, signs a written consent to be tried before the commissioner.

**The only provision in the Federal Rules of Criminal Procedure on the issue is the extremely neutral statement in Rule 23(a) that "[c]ases required to be tried by jury shall be so tried...."

to proceed in the District Court is a jury trial." Id. at 974. See Goldsmith, The Role and Jurisdiction of the United States Commissioner in the Federal Judicial Structure, in Hearings on S.945 Before Subcommittee on Improvements in Judicial Machinery, Senate Committee on the Judiciary, 89th Cong., 2d Sess, at 318, 346 n.134 (1967) (hereinafter cited as Senate Hearings); Memorandum Prepared by the Staff of the Subcommittee on Improvements in Judicial Machinery, April 28, 1966, in Senate Hearings, supra, at 16. And the court determined that where Congress has not stated an intent to adjudicate offenses summarily, a jury trial is required. United States v. Bishop, supra, 261 F.Supp. at 975; see Smith v. United States, supra; United States v. Martinelli, supra; United States v. Great Eastern Lines, Inc., supra.

The court's conclusion on this issue is supported by the Supreme Court decisions in Federal cases concerning petty offenses other than contempt. Thus, in Callan v. Wilson, 127 U.S. 540, 555 (1888), the Court first enunciated the rule that it was permissible to try petty offenses without a jury, stating that such offenses might "under authority of Congress" be tried without a jury. In District of Columbia v. Colts, 282 U.S. 63, 72-73 (1930), where the Court held that a defendant charged with reckless driving could not be denied a jury trial, the Court noted "that there may be many offenses called 'petty offenses' which do not rise to the degree of crimes within the meaning of Article 3, and in respect of which Con-

gress may dispense with a jury trial." In District of Columbia v. Clawans, supra, 300 U.S. at 628, the statute under which the respondent was convicted provided for a trial with a jury in only those cases required by the Constitution, with a proviso that in cases of punishment greater than \$300 or imprisonment of more than ninety days, the defendant's trial should be by jury if so demanded. The Court noted: "Congress itself, by measuring the punishment in this case ... and declaring that it should be applied today unless found to transgress Constitutional limitations, has expressed its deliberate judgment that the punishment is not too great to be summarily administered." In all these cases the Court clearly indicated that it was constitutionally permissible to deny a jury trial of petty offenses where Congress had specifically provided for summary adjudication. Here, as in Bishop, there has been no Congressional enactment denying appellant a jury trial in a trial of a petty offense in the district court. Accordingly, there was no authority to deny her a trial by jury.*

*See also Muniz v. Hoffman, 422 U.S. 254 (1975), where the Court found that the defendant had no right to a jury trial in a summary contempt proceeding under §10(1) of the National Labor Relations Act. In its decision, the Court noted that the labor statute it was construing "created an exception to the historic rule there was no right to a jury trial in contempt proceedings." This holding is not contrary to appellant's position, for contempt is a procedure treated in a manner far different from ordinary criminal adjudications. See generally Green v. United States, 356 U.S. 165, 188 (1958) (appellate court review of sentences in contempt cases).

Without taking issue with these general principles, a more recent case has held that the 1968 amendments to the Federal Magistrates Act (18 U.S.C. §3401) and the Rules of Procedure for the Trial of Minor Offenses before United States Magistrates, effective 1971, demonstrate Congressional intent to try petty offenses in the district court without a jury. United States v. Merrick, 459 F.2d 644 (4th Cir. 1972).^{*} With respect to the Magistrates Act, however, the legislative history belies any intent to change jury trial rights for trials in district courts; with respect to the Rules for Procedure, the very terms of the rules preclude application to the district courts.

In 1968, Congress amended 18 U.S.C. §3401 to expand the jurisdiction of magistrates to most "minor" criminal offenses with maximum penalties of one year or less. The legislation also amended the "waiver" provision of §3401 from a statement that a defendant should be informed of his right to elect a trial in a district court to a statement that he be informed that he "has a right to a trial before a judge" and that he "may have a right to a trial by jury." However, there is no indication that this enactment was designed to restrict the right to a trial by jury for petty offenses which existed

^{*}But see also United States v. Floyd, 345 F.Supp. 283 (W.D.Okla. 1972), affirmed, 477 F.2d 217 (10th Cir.), cert. denied, 414 U.S. 1044 (1973), (finding Congressional intent to eliminate jury trial in designation of offenses as "petty"); United States v. Cain, 454 F.2d 1285 (7th Cir. 1972); United States v. Potvin, 481 F.2d 380 (10th Cir. 1973).

prior to the 1968 amendments. Indeed, according to the original sponsor of the legislation, the waiver provision was designed to "give the defendant or Government the right to demand a jury trial by saying we want it tried in the district court." See Hearings on S.945 Before Subcommittee of Committee on the Judiciary, House of Representatives, 90th Cong., 2d Sess (1968) at 90. Moreover, the staff memorandum prepared by the Subcommittee on the Judiciary clearly indicated that the waiver provision was intended to continue the practice of informing defendants of their right to elect trials by jury before the district court. Memorandum Prepared by the Staff of the Subcommittee on Improvements in Judicial Machinery, April 28, 1966, in Senate Hearings, supra, at 16. Finally, we are aware of no statement in the Congressional debates indicating an intent to dispense with jury trials for those defendants electing to proceed in the district court. Indeed, the very purpose of that election to proceed to trial in the district court rather than by a magistrate was to afford the right to a jury trial, for in all other important particulars, the procedures in the magistrate's court and the district court are identical. Absent any specific indication in the legislative history of the 1968 amendments to restrict the right to a jury trial, this Court should not read in a revision of the Magistrates Act a substantial change in an accepted practice. Cf. Muniz v. Hoffman, supra, 422 U.S. at 470.

In United States v. Merrick, supra, the Fourth Circuit found an intent to dispense with jury trials of petty offenses in the district court by reference in the Rules of Procedure for the Trial of Minor Offenses before United States Magistrates. Rule 2, dealing with trials of minor offenses, for which the penalty may exceed six months, prescribes that the magistrate is required to explain to the defendant that "he has a right to a trial before the district court and a jury." Rule 3, relating to trials of petty offenses, provides that the defendant need only waive "trial before a judge of the district court." By negative pregnant, the Rules have thus been construed to suggest that there exists no right to jury trial for trials of petty offenses before the district court. United States v. Merrick, supra, 459 F.2d at 645-646; see 51 F.R.D. 206, 207 (Black, J., dissenting to adoption of Rules of Procedure for Trials of Minor Offenses Before United States Magistrates).

We submit, however, that this reading stretches the Magistrates Rules much too far. By their own terms, these rules were designed to apply to proceedings before magistrates -- not to trials of offenses in the district court. It is simply unreasonable to read rules designed for so limited a purpose to alter the right to a jury trial in the district court. Surely, had such a change in the right to a jury trial been contemplated, it could more clearly and easily have been undertaken by a revision in the Federal Code or Rules of Criminal

Procedure, both of which at least apply to the Federal district courts.

In sum, neither the Rules of Procedure Before the Magistrates nor the amendments to 18 U.S.C. §§3401-3402 change the Federal statutory right to a jury trial for petty offenses. Congress has had manifold opportunities specifically to abrogate this policy for appellant's offense, and it has never availed itself of these opportunities. Accordingly, it was error to deny appellant a jury trial in this case, and the judgment of conviction against her must be reversed.

Point II

IN THE ALTERNATIVE, THE COURT ERRED
BY FAILING TO EXERCISE ITS DISCRE-
TION TO GRANT OR DENY APPELLANT A
JURY TRIAL.

Assuming arguendo that appellant had no statutory right to a jury trial, it is nevertheless clear that Judge Cooper possessed the discretion to afford her a trial by jury. United States v. Beard, 313 F.Supp. 844 (D.Minn. 1970); J.Moore, MOORE'S FEDERAL PRACTICE, ¶23.03[2] (Supp. 1975). Although appellant urged the court to exercise its discretion-- citing the prejudice she would suffer in the event of a non-jury trial--the court failed to do so. Rather, the court's summary denial of appellant's right to a jury trial was predicated on the court's erroneous view that it was obliged to deny her the right to a jury trial. The court's failure to exercise its discretion upon appellant's request requires a reversal.

The issue of the court's discretion in this area was directly considered in United States v. Beard, *supra*. There, eighty-six defendants were accused of the petty offense of obstructing the general public and employees of the Postal Service, in violation of 40 U.S.C. §318(a). The defendants moved in district court for a jury trial, arguing that where Congress had not legislated for or against a jury trial on petty offenses, a right to a jury trial should obtain. While the court disagreed, it found that "since Congress has not

spoken on the subject, it would appear that the granting of a jury trial rests with the court's discretion." United States v. Beard, supra, 313 F.Supp. at 845-846. The court then granted a jury trial, under specified conditions. The court's position on the discretionary grant of a jury trial is also supported by Professor Moore: "In the absence of [Congressional] specification, an offense which is defined by 18 U.S.C. §1 is not triable by jury under Rule 23, unless the court, in its discretion, chooses to accord a jury trial." 8 J.Moore, MOORE'S FEDERAL PRACTICE, ¶23.03[2] (Supp. 1975) (emphasis supplied).

Thus, even if appellant is incorrect in her view that a jury trial is mandated, it is clear that the court is empowered with the discretion to afford such a right. And, it is axiomatic that since the court had the discretionary power to grant or deny a jury trial, it was obliged to exercise that discretion upon appellant's timely request. Cf. United States v. Brown, 470 F.2d 285 (2d Cir. 1972); United States v. Fields, 466 F.2d 119 (2d Cir. 1972); United States v. Williams, 407 F.2d 940 (4th Cir. 1969).

Here, the court did not exercise an informed discretion to deny a jury trial, for the court was utterly unaware it had any such discretion. The court's decision merely stated that "under the authorities" appellant had no right to a jury trial, without ever indicating awareness of any judicial power to grant such a trial. And this decision was made following at least one defense argument addressed to the court's discretion --

that appellant was prejudiced by a non-jury trial since her entire preparation had been for a jury trial (6-7, 8).

Moreover, a proper exercise of discretion in this case surely would have resulted in a grant of a jury trial. While the need to ease court congestion has been cited as a reason supporting summary adjudication of petty offenses (see Doub & Kestenbaum, Federal Magistrates for the Trial of Petty Offenses: Need and Constitutionality, 107 U.Pa.L.Rev. 443, 445-448 (1959)), here, little time would have been "wasted" by a jury trial. The case was already before a judge and a jury panel was present in the courtroom when the Assistant U.S. Attorney moved for a trial. It would have taken but little extra time to choose a venire for this case. In contrast to the minimal "benefit" secured by eliminating a jury, the prejudice suffered by appellant was great. As counsel informed the court, appellant had prepared, up to that very day, for a trial by jury, and "[o]ur approach in the event a non-jury trial was anticipated and would have been substantially different" (3). And the Assistant U.S. Attorney cited no reason other than appellant's lack of a constitutional entitlement to a jury trial why his office was opposed to a jury trial. Had the court's discretion been exercised, all factors pointed toward the granting of a jury trial.

Thus, the court's failure to exercise its discretion was prejudicial as well as erroneous. Accordingly, the judgment of conviction must be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the District Court must be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

April 15, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

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